

NO. 83937-9

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES R. CARY, MARY ALICE CARY, JOHN E. DIEHL, and
WILLIAM D. FOX, SR.,

Appellants,

v.

MASON CONSERVATION DISTRICT,

Respondent,

and

MASON COUNTY,

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON STATE
CONSERVATION COMMISSION

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I. INTRODUCTION

The Washington State Conservation Commission (Commission), as the state entity charged with overseeing and assisting local conservation districts, offers this amicus curiae brief to present its view that this Court should uphold the natural resource conservation assessment at issue. The Legislature has made a specific finding that programs to conserve natural resources, such as those offered by the Respondent Mason Conservation District (Mason), are of special benefit to land. This finding is determinative and supports the assessment here. Petitioners' arguments against the validity of this assessment are not consistent with the case law governing special assessments. As a result, the Court should hold that the assessment at issue is a valid assessment under RCW 89.08.400.

II. IDENTITY AND INTEREST OF AMICUS

The Commission is a state agency charged with facilitating various natural resource protection programs, including programs aimed at soil conservation and floodwater protection. *See generally*, RCW 89.08.010; RCW 89.08.070. The Commission is specifically charged with assisting and overseeing conservation districts established under RCW 89.08, including Mason. The Commission has promulgated rules for the creation of special assessments, *see* WAC 135-100, and the Court's decision in this

case will likely bear directly on the current rule. As such, the Commission has an interest in this case.

The Commission has reviewed the filings in this case and is familiar with the issues involved and the arguments on appeal. Additionally, the Commission filed an amicus curiae brief with the Court of Appeals in this matter.

III. SPECIFIC ISSUE ADDRESSED IN AMICUS BRIEF

The Commission submits this brief to address one issue:

1. Is the Mason Conservation District special assessment at issue valid, given the Legislature's determination that conservation district programs convey a special benefit to land and the established case law governing special assessments?

IV. ARGUMENT

A. Conservation Districts Are Charged With Creating And Implementing Programs Designed To Preserve The Renewable Natural Resources Of The State, With Special Assessments As A Major Funding Mechanism

1. **Conservation districts have broad authority to protect natural resources for the benefit of lands within their districts**

Today's conservation districts evolved from the Soil Conservation Districts created by the Legislature in 1939. Laws of 1939, ch. 187. Soil Conservation Districts were originally formed to conserve the soil

resources of the state, and through the prevention of soil erosion also preserve the natural resources of the state. This conservation role has now been expanded to encompass a broad natural resource protection mandate.¹ Districts conduct research and educational or demonstration projects, and construct physical improvement works for the benefit of lands within their boundaries. RCW 89.08.220. The conservation charge to districts is very broad, and districts may partner with the Commission, other districts, and state or federal agencies in order to accomplish the goals of resource protection and technical service to landowners. RCW 89.08.220. Importantly, a local political subdivision (such as a county) may contract with a district and collaborate on activities. RCW 89.08.220(8); RCW 89.08.341.

Districts are required to submit to the Commission both comprehensive long range programs and annual work plans. RCW 89.08.220(7). District plans must address the conservation of renewable resources for the benefit of the district and the state, and programs address a variety of natural resource challenges including watershed stabilization, erosion control and reduction of runoff, and reduction of pollution in rivers and other waters. RCW 89.08.220(7).

¹ Compare Laws of 1939, ch. 187, § 2 with the current RCW 89.08.010 (expanding the responsibilities of districts from farm and pasture lands to all lands of the state, and expanding the services of conservation districts beyond rural areas to urban and suburban areas. RCW 89.08.010(4)).

Districts are prohibited from levying taxes or issuing bonds to fund these programs. RCW 89.08.220. At the center of this case, however, is the Legislature's specifically authorized special assessment for funding district activities.² RCW 89.08.400. These assessments serve as a major funding mechanism for many of Washington's conservation districts.

2. Special assessments are a major funding mechanism for many of Washington's conservation districts and require action by both a district and the county in which the district is located

Special assessments may be imposed on land to provide funds for conservation activities within district boundaries. Laws of 1989, ch. 18, § 1. Such assessments are developed locally, approved locally, and respond to local priorities for the protection of natural resources, including soil and water. Currently fifteen districts have proposed, and county governments have approved, special assessments for conservation programs.³ Funds from such assessments can be leveraged through grants and matching programs, including those operated by the Commission. As such, the assessments represent a major source of funds for conservation districts to carry out their mandated activities.

² In addition, conservation districts are authorized to accept donations, grants, funds from state or local agencies or political subdivisions, and allocations from the Commission. RCW 89.08.220(10); RCW 89.08.341.

³ See map at Commission website at <http://www.scc.wa.gov/index.php/Conservation-Districts-with-Special-Assessments.html>.

By statute, a special assessment requires action by both the conservation district and the county in which the district is located. Both the district and the county must hold at least one public hearing. RCW 89.08.400(2). The district is directed to file with the county government a proposed system of assessments and a proposed budget. RCW 89.08.400(2). The county's legislative authority may then accept, or modify and accept, the district's proposed system of assessments. RCW 89.08.400(2). In order for the proposed system of assessment to be approved, the county must make a specific finding (as Mason County did in this case) that the special assessment being imposed does not exceed the benefit being provided to the lands subject to the assessment. RCW 89.08.400(2).

The county, and not the district, thus imposes and collects a special assessment. The county, however, does not approve, and may not modify, the district's budget or planned expenditures for the collected funds. Op. Att'y Gen. 8 (2006). The budget and priorities for funds raised are in the control of the conservation district. *Id.* at 5. The district, through its budget and annual work plan, determines what specific tasks will be accomplished to preserve natural resources within the district boundaries. *Id.* at 6.

Mason's current conservation program priority is stormwater management. See Washington State Conservation Commission, *Promises Made, Promises Kept 2009 Annual Report* at 62 (2009), pertinent portions attached as Appendix A. Proper management of stormwater runoff protects land by reducing soil erosion, and protects water quality by reducing the introduction of soil and pollutants into water bodies. Mason has chosen to utilize the county as a contractor to accomplish some of the work related to its stormwater program. This is consistent with statute. See RCW 89.08.341 (providing that counties and conservation districts may cooperate through contract, regulation, or other means).

B. Because Mason's Assessment Confers A Special Benefit On The Properties Assessed, It Is A Valid Assessment Under RCW 89.08.400

Special assessments are charges imposed on property owners to help pay the cost of a local improvement that provides a special benefit to the land. *Covell v. City of Seattle*, 127 Wn.2d 874, 889, 905 P.2d 324 (1995). Assessments have been enacted for purposes as diverse as noxious weed control, ditches, and business improvement districts. RCW 17.10.240; RCW 85.08.285; *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 787 P.2d 39 (1990).

A valid special assessment requires that a benefit is conferred on the property assessed. *In re Jones*, 52 Wn.2d 143, 145, 324 P.2d 259

(1958). “[A] special assessment is based wholly on benefits.” Thomas M. Cooley, *The Law of Taxation* § 31, at 107 (Clark A. Nichols ed., 4th ed. 1924). “If there is no benefit, there can be no assessment.” *Heavens v. King Cy. Rural Library Dist.*, 66 Wn.2d 558, 564, 404 P.2d 453 (1965). The land assessed must receive a benefit that is more intense than land outside of the limited area assessed. *Covell*, 127 Wn.2d at 889.

The Petitioners argue that Mason’s assessment is invalid because (1) the special benefit to the land is absent, (2) the activities funded by the assessment convey a generalized benefit to members of the public, and (3) undeveloped land subject to assessment does not contribute to stormwater runoff, and thus creates no burden. However, the Legislature has already made the determination that conservation programs like the programs funded by this special assessment are of special benefit to land. RCW 89.08.400(1). As explained below, this determination controls the issue. Additionally, as supported by case law, the fact that a generalized benefit to the public may exist does not invalidate a special assessment. Finally, Petitioners’ argument that undeveloped land does not implicate stormwater management is based on a misfocused analysis of the extent to which property burdens the resource. As discussed below, the analysis of the validity of the assessment is based only on whether a special benefit is

conveyed to the property, not the extent to which the property has created a burden.

1. This assessment is supported by the Legislature's finding that conservation programs specially benefit land

The assessments authorized by RCW 89.08.400 are supported by the Legislature's determination that special benefits attach to the land through conservation district programs. The Legislature has specifically found that "[a]ctivities and programs to conserve natural resources, including soil and water, are declared to be of special benefit to lands *and may be used as the basis upon which special assessments are imposed.*" RCW 89.08.400(1) (emphasis added). This is consistent with the Legislature's express policy to provide for the conservation of the renewable resources of the state. RCW 89.08.010(4).

So long as an assessment does not exceed the benefit to the property, determining the benefits for an assessment is primarily a legislative question. *Rogers Clothing*, 114 Wn.2d at 224. "[A]s a general proposition the determination of what kind of a benefit will support a special assessment is a decision best left to the legislative process" *Id.* at 226.

Where there is no legislative finding that a benefit to assessed properties exists, assessments have been invalidated. For instance, the

Legislature made no finding of special benefit to property when it enacted a law creating local improvement districts to fund the construction of libraries. Laws of 1961, ch. 162. In fact, it was left up to the board of the library district to determine whether or not a special benefit was conveyed to land by the building of a library. Laws of 1961, ch. 162, §§ 2-3. This Court invalidated the local improvement district and its assessment for library construction because it found libraries were not constructed to enhance the real estate surrounding them. *Heavens*, 66 Wn.2d at 566. Instead it determined that libraries are for the general education of the community at large, and thus did not confer any special benefit to the assessed land. *Id.* at 565-566. The Court specifically noted the lack of a legislative finding that libraries were of special benefit to land. *Id.* at 560.

Here the Legislature has made a clear statement that lands are benefited by conservation programs, and that those benefits support a conservation assessment. RCW 89.08.400(1). This determination controls the Petitioners' issue. Because a legislative determination has already been made that conservation district programs provide a special benefit to lands, there is a valid basis for the assessment.

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2. A generalized benefit to the public does not invalidate a special assessment

While there must be a specific benefit to lands assessed, it does not follow that there cannot be a general benefit from natural resource conservation programs. Petitioners claim that it is impermissible that properties not assessed, including those outside the conservation district, might benefit from the stormwater management and erosion control activities that results in cleaning up Puget Sound.⁴ That there is also an incidental general positive benefit to the water quality of Puget Sound, however, does not negate a special benefit to an individual property from a conservation program addressing stormwater and erosion control.

In *In re Aurora*, this Court upheld an assessment for the construction of a bridge and street connecting north and south Seattle over the ship canal. *In re Aurora Avenue*, 180 Wash. 523, 524, 41 P.2d 143 (1935). The opponents contended that this new bypass was only of general benefit to the whole of the city, and conveyed no special benefit to lands assessed. *Id.* at 529. The Court, however, found that the business areas directly adjacent to the new street and bridge did specially benefit from improved direct access to those areas. *Id.* at 531-32. The general

⁴ In effect they argue that an assessment is not proper unless the program *exclusively* benefits the land assessed. But the very nature of conservation programs is that while they enhance the use and value of particular land, they also provide broad benefits to the general public. The petitioners' approach would essentially negate the statutory scheme underlying the creation of conservation districts.

benefit afforded the public from the new roadway “[did] not preclude the idea of special benefit to property particularly served by the improvement.” *Id.* at 529.

The same principle applies in this case. The fact that broader benefit might accrue from a program addressing stormwater and erosion control on specific properties within Mason’s boundaries does not negate the special benefit directly enjoyed by those properties.

3. Other government charges based on burden on the system should not be confused with the basis for special assessments, which is benefit to land

Petitioners argue that the conservation assessment must be proportional to the burden their property places on the system. Petition for Review at 11–12. However, the validity of a special assessment is based on whether there is a special benefit to property from an assessment, not whether a specific property burdens a system.

Petitioners rely on *Tukwila School District* to argue their lands should not be assessed because their lands do not contribute to stormwater runoff. *Id.* In *Tukwila School District* the court upheld a fee imposed that funded a utility that provided service to properties and that was based on the burden from stormwater runoff caused by those properties. *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 745, 167 P.3d 1167 (2007). Created under RCW 35.67, the ordinance at issue existed to

fund the city utility, and was required to consider the different character and service provided to customers. *Id.* at 744. By statute the system of charges was developed based on specific factors, and under a requirement for uniformity of charges. *See* RCW 35.67.020(2).

This case, in contrast, concerns a special assessment under RCW 89.08.400. As such, the analysis must be based on the benefit to the property. *See Frese v. City of Normandy Park*, 64 Wn.2d 411, 392 P.2d 207 (1964) (explaining that “[i]t is axiomatic that the basic principle and very life of the doctrine of special assessments is that there can be no such assessment on property unless there is a pro tanto special benefit from the improvement.” *Id.* at 423). Under that analysis, Petitioners’ parcels are still benefitted even if they do not currently generate stormwater. First, the benefit of conservation programs that manage stormwater and control soil erosion can be achieved both directly and indirectly on a property. Even if a property does not generate stormwater itself, it can still be indirectly benefitted through limiting the vulnerability of the property to the negative effects of erosion from neighboring parcels. *See* RCW 89.08.010(1). Second, a parcel that is currently undeveloped may in the future undergo development that directly implicates natural resource conservation. Property is not exempt from special assessment because it is not currently being used in such a way that would allow it to be benefitted.

In re Jones, 52 Wn.2d at 146. Third, because the benefits stemming from a special assessment may accrue over many years, an exact calculus of the benefit in any given year may be difficult or impossible. Indeed, an exact equality of the benefit to the assessment is not required, so long as there is not a material "substantial excess" of charge to the owner. *Village of Norwood v. Baker*, 172 U.S. 269, 279, 19 S. Ct 187 (1898). Finally, on the issue of whether such a material excess exists, Mason County has made an express finding that "the special assessments to be imposed will not exceed the special benefit the land receives or will receive from activities funded by the assessment." Mason County Board of County Commissioners, *Finding of Fact: Proposed Special Assessment for Natural Resource Conservation*, RCW 89.08.400 (August 28, 2002), attached as Appendix B.

This finding is to be given great weight, and a county is to be accorded wide scope in its fact finding on a special assessment. *See In re Aurora* 180 Wash. at 526. When judicial review of a special assessment is sought, the presumption is that the assessment is properly formed, and that the benefit to land is greater than the amount of the assessment. *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 576 P.2d 888 (1978).

By focusing their arguments on the relative burdens created by properties, rather than the special benefit properties receive, the

Petitioners' arguments are unavailing. Mason's assessment is valid under the case law governing special assessments.

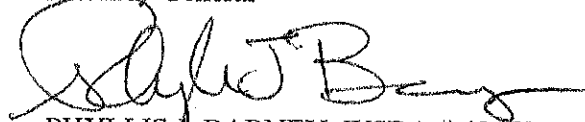
V. CONCLUSION

The Legislature has already determined that natural resource conservation programs convey special benefits to lands. The case law construing special assessments further supports the validity of the assessment at issue. The Washington State Conservation Commission respectfully requests that this Court uphold the Mason Conservation District's special assessment as a valid natural resource conservation assessment.

RESPECTFULLY SUBMITTED this 13th day of December 2010.

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Promises Made, Promises Kept

2009 Annual Report

Appendix A

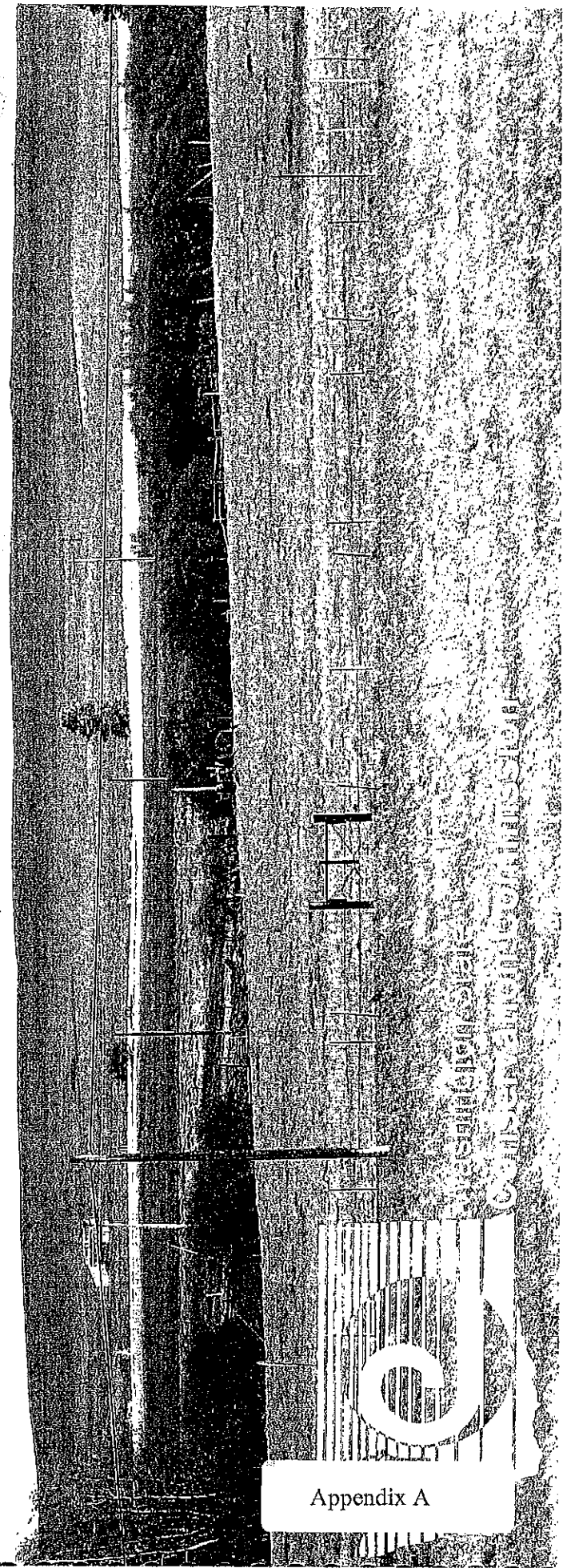
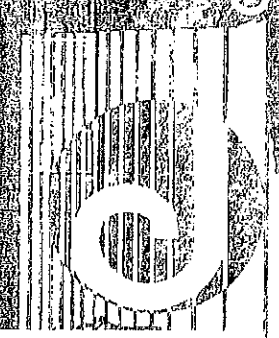


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"Becoming a conservation district supervisor has crystallized in my mind why conservation is so important: No planet, No civilization. One indisputable thing the people of the world share in common is the planet on which we live. In my lifetime, Earth is the ONLY planet we all will have the privilege of calling home. It is our collective obligation to each do our part to take care of our corner of home, for ourselves and for future generations."

*~Larry Davis, Supervisor, Whatcom
Conservation District*

Mason Conservation District

State Legislative District #35
Congressional District #6

Other Accomplishments

Improving Stormwater Management

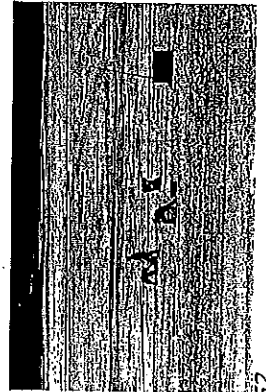
Mason CD plays an essential role promoting better stormwater management.

Education

MCD, in partnership with WSU Mason County Extension, is drafting and implementing a Countywide Storm-water Education Plan.

Stormwater Workshops and Technical Assistance

In addition to traditional technical assistance services, MCD provides stormwater management assistance to all property owners. We hold "Managing Stormwater in Your Backyard" workshops & help landowners use BMPs that protect both water quality and their property. When appropriate, Low Impact Development tools such as rain gardens are recommended as stormwater management BMPs.



2009 Feature Accomplishment

Low Impact Development Demonstration Projects

Resource Challenge

Polluted stormwater runoff is a growing threat to water quality around Puget Sound. With 65 inches of rain each year and a vibrant aquaculture industry directly impacted by runoff, Mason County has a lot of stormwater to manage. Mason County is also phasing in a new Stormwater Management Plan in anticipation of becoming an NPDES Phase II permittee. It recently adopted a Low Impact Development (LID) Ordinance that requires LID for certain types of new development. These changing stormwater management requirements create a demand for new information, guidance materials, technical assistance, and education services.

Project Summary and Results

Mason CD plays a leading role in helping the community understand these changing requirements. It secured funding from the State Department of Ecology to build two LID demonstration projects. The first site, including a pervious concrete parking lot and native plant landscaping, is complete.

The second demonstration project retrofits the parking area at a local school and includes a pervious parking lot, rain gardens, and bio-retention swales. It is on schedule for completion by December 2009. In addition to these large-scale construction projects, Mason CD is building other demonstration rain gardens with local watershed planning units, schools, and the local Port. Our goal is to further promote low impact development techniques and to provide accessible examples of how LID helps to manage stormwater. In partnership with the Squaxin Island Tribe and US EPA, Mason CD is developing additional LID project sites, technical guidance materials, and training opportunities for County residents and agency staff.

Key Project Partners

WA State Department of Ecology, US Environmental Protection Agency, Squaxin Island Tribe, Mason County Public Works, Turning Pointe Domestic Violence Shelter, Pioneer School District #402, Port of Shelton, WRJA 16 Watershed Planning Group, WSU Mason County Extension.



Low Impact Development
Demonstration Site: Pervious
Concrete Parking Lot

Contact Information

John Bolender, District Manager
450 W. Business Park Road
Shelton, WA 98584
(360) 427-9436, ext. 21
jbolender@masoncd.org
www.masoncd.org

Board of Supervisors:

Gary Schuyten, Chair
Mark Biser, Vice-Chair
Duane Phinnney, Auditor
Michelle McCallum, Member
Adam James, Member

More Work To Do

Providing comprehensive stormwater education and technical assistance is essential, especially in areas of high resource concern such as rapidly developing marine shorelines.

Mason County Board of County Commissioners
Public Hearing - August 27, 2002

Finding of Fact: Proposed Special Assessment for Natural Resource Conservation;
RCW 89.08.400

- I. This is a request for adoption of a special assessment for natural resource conservation as defined by RCW 89.08.400.
- II. RCW 89.08.400 states in part, "the county legislative authority may accept, or modify and accept, the proposed system of assessments, including the number of years during which the special assessment shall be imposed, if it finds that both the public interest will be served by the imposition of the special assessments and that the special assessments to be imposed on any land will not exceed the special benefit that the land receives or will receive from the activities of the conservation district. The findings of the county legislative authority shall be final and conclusive." The findings are as follows:
 1. The Board of Commissioners has a responsibility to the residents of Mason County to provide for the prevention, control and abatement of nuisances detrimental to public health. This assessment and the partnership proposed would secure a constant source of funding for these services.
 2. The assessment will provide increased protection of drinking water from non-point pollution sources.
 3. By providing a constant source of funding the assessment will enable both Mason Conservation District and Mason County Department of Health Services to provide increased response to citizen concerns in all areas of the county.
 4. Public interest will be served by protection of recreational opportunities, which include: swimming, fishing, shellfish harvesting, and boating.
 5. The proposed programs would provide the community with increased awareness of their role as individuals in protection and conservation of natural resources in our county.
 6. The public interest of Mason County property owners, residents and visitors is served by protection of water resources. Maintaining clean water for drinking, recreation, and commercial activities works to build a healthy community and economy.
 7. Property values are enhanced when there is greater confidence in safe drinking water and surface water.
 8. The Board of Commissioners acknowledges that grants are one source of revenue to fund water quality projects. However, grant funding is not sustainable, predictable, or free. It is, therefore in the public interest to create a sustainable source of funding for water quality issues.

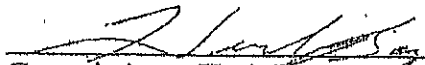
EXHIBIT C

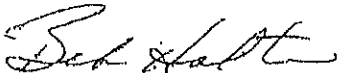
9. Grant funding is only available after severe water quality degradation has already occurred and most require at least 25% in matching funds. The assessment can provide the matching funds required for specific projects identified by both the Mason Conservation District and Mason County Department of Health Services.
10. Mason County has the responsibility, but not the available resources to fund the investigation of immediate and emerging water quality issues. This assessment will support the public interest of our citizens by providing funds for water quality pollution identification and abatement before pollution adversely impacts our community's health, economy and way of life.


On July 17th and 18th of 2002, the Mason Conservation District in accordance with RCW 89.08.400 conducted two public hearings regarding the special assessment. During the hearings testimony was heard. No participants opposed the assessment. All participants supported the assessment. During the comment period 2 letters in opposition of the assessment were received. On August 27, 2002, in accordance with RCW 89.08.400, the Board of County Commissioners held a public hearing.

FROM THE PRECEEDING FACTS, the Board finds that the proposed assessment will serve the public interest; and that the special assessments to be imposed will not exceed the special benefit the land receives or will receive from activities funded by the assessment. The Board approves the special assessment under the authority of RCW89.08.400 subject to the following modifications and/or conditions:

1. The assessment shall be a five-dollar flat rate on all nonforest land parcels within the boundaries of the Conservation District.
2. The Conservation District and Mason County Department of Health Services must sign a Memorandum of Agreement to carry out these findings.

 8/28/02
Commissioner Herb Baze Date

 8-28-02
Commissioner Bob Holter Date

 8/28/02
Commissioner Wes Johnson Date

(Mason County Board of County Commissioners Hearing August 27, 2002, for adoption of Special Assessment for Natural Resource Conservation RCW 89.08.400)